

## **Payment Notices and Successive Adjudications: Court of Appeal Update**

**By Peter Sheridan**

As discussed in earlier articles, the sum due as an interim payment to a contractor is normally the sum that results from the employer's payment notice and pay less notice, if any. But if the employer fails to issue either a valid payment notice or a valid pay less notice, the contractor is entitled to be paid the sum it notifies. This situation arises as a matter of contract under the JCT Design and Build contract but also as a matter of statute (the Housing Grants, Construction and Regeneration Act 1996) ("the HGCR Act") under construction contracts generally.

In *ISG Construction Ltd v Seevic College* (2014) and *Galliford Try Building Ltd v Estura Ltd* (2015), as described in earlier articles, Edwards-Stuart J's analysis was that, where the amount of interim payment is fixed by the contractor's application, the employer having failed to issue a payment notice or pay less notice, the amount applied for is deemed to be the correct valuation and is also deemed to be agreed. He decided it is not permissible to have a second adjudication, on the "true" valuation of that particular interim payment, when a first adjudication decides the sum payable on the basis of notices, although it would be possible to have an adjudication on the true valuation of the next interim payment.

One of the recent cases on payment notices, *Harding v Paice* (2015), has now been to the Court of Appeal. Harding, the contractor, claimed in an adjudication the payment said to be due following termination. This adjudication (the parties' third) was decided purely on notices, *i.e.* that the contractor was entitled to the sum applied for, in the absence of a valid pay less notice. The court proceedings were concerned with Harding's attempt to prevent a further adjudication, which Paice wanted to start, which would deal with the true valuation.

The trial judge, again Edwards-Stuart J (but before *ISG* and *Galliford Try*), had decided that Paice could go ahead with the further adjudication. In *Harding v Paice* the parties were concerned with the final payment position following termination, not an interim payment, as in *ISG* and *Galliford Try*. Although the temporary position is that the parties are stuck with the position established by notices at an interim payment, an aggrieved party is not permanently barred from having the correct valuation decided in a subsequent adjudication. With a final payment, or at least a payment due on termination, Edwards-Stuart J was of the view that there could be a subsequent adjudication on the correct valuation of the very payment already decided in adjudication on the basis of notices.

That is clearly correct in the writer's view; what is much more in doubt is whether the different line taken by the judge in *ISG* and *Galliford Try* was correct in respect of interim payments. The Court of Appeal did not have to, and decided not to, look into whether the approach in those cases was correct.

Jackson LJ in the Court of Appeal noted that what was decided in the third adjudication was a dispute with two issues. The first issue was characterised as "contractual" and was the issue of the amount

payable as a result of the operation of notices. The second issue was valuation, *i.e.* the true valuation on the merits (regardless of the position on notices). The adjudicator had made it very clear that he had decided only the first issue. What the Court of Appeal decided was that the second issue could still be decided in a further adjudication (upholding Edwards-Stuart J's decision).

It is likely that the same approach would be taken in respect of a final payment (in a case with no termination). It remains unclear whether the payment notice provisions of the HGCR Act apply to final payment or payment on termination provisions; the Court of Appeal unfortunately gave no guidance on this.

Similarly, the Court of Appeal gave no guidance on whether, once an adjudicator decides the amount of an interim payment purely on notices, there can be a further adjudication on the "true" valuation of that very interim payment. If so, *ISG* and *Galliford Try* would be wrongly decided. That issue still remains to be considered by an appellate court. What one can say at this stage is that Jackson LJ's clear distinction between the contractual and valuation issues does not fit well with the analysis in *ISG* and *Galliford Try*, which sought, with questionable logic, to blur this distinction for the interim payment in question (but for adjudication only, not the court) but to make the distinction in respect of any subsequent interim payment.

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